

Resource Book on TRIPS and Development

The Resource Book, conceived as a practical guide to the TRIPS Agreement, provides detailed analysis of each of the provisions of the Agreement, aiming at a sound understanding of WTO Members' rights and obligations. The purpose is to clarify the implications of the Agreement, especially highlighting the areas in which the treaty leaves leeway to Members for the pursuit of their own policy objectives, according to their respective levels of development. In doing so, the book does not produce tailor-made prescriptions but gives guidance on the implications of specific issues and on the options available. The book is not limited to the analysis of the TRIPS Agreement but also considers related questions and developments at the national, regional, and international level.

The United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Trade and Sustainable Development (ICTSD) have come together to implement the Capacity Building Project on Intellectual Property Rights and Sustainable Development. The Project aims to improve understanding of the development implications of the TRIPS Agreement. The Resource Book is a contribution to this effort.

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Development
UNCTAD-ICTSD



CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
40 West 20th Street, New York, NY 10011-4211, USA
www.cambridge.org
Information on this title: www.cambridge.org/9780521850445

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First published 2005

Printed in the United States of America

Typefaces New Aster 9/12 pt. and Avenir *System* L^AT_EX 2_ε [TB]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

ISBN-13 978-0-521-85044-5 hardback
ISBN-10 0-521-85044-4 hardback

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Preface

Intellectual Property (IP) was until recently the domain of specialists and producers of Intellectual Property Rights (IPRs). The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) concluded during the Uruguay Round negotiations has in this regard signalled a major shift. The incorporation of IP into the multilateral trading system and its relationship with a wide area of key public policy issues has elicited great concern over its pervasive role in people's lives and in society in general. Developing country Members of the World Trade Organization (WTO) no longer have the policy options and flexibilities developed countries had in using IPRs to support their national development. But TRIPS is not the end of the story. Significant new developments have taken place at the international, regional and bilateral level that build on and strengthen the minimum TRIPS standards through the progressive harmonization of policies along standards of technologically advanced countries. The challenges ahead in designing and implementing IP-policy at the national and international levels are considerable.

This book has been conceived as a guide offering background and technical information on the TRIPS Agreement. It provides legal and economic analysis on each treaty provision with a view to identifying development-friendly policy options for the implementation of the Agreement. From this point of view, the book, because of its contents and coverage, should be of interest to a wider audience including practitioners, academics, diplomats and policy-makers in general.

The book is a major output of the UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development¹ launched in 2001. The central objective of the Project is to contribute to the emergence of a critical mass of a well-informed IP community – decision makers, negotiators, private sector and civil society, particularly in developing countries – able to define their own development objectives and effectively advance those objectives at the national and international levels.

September 2004

Rubens Ricupero
Secretary-General, UNCTAD

Ricardo Meléndez Ortiz
Executive Director, ICTSD

¹ For information on the activities and outputs of the UNCTAD-ICTSD Project, see <<http://www.iprsonline.org/unctadictsd/description.htm>>.

Acknowledgments

This Resource Book has been prepared under the responsibility of the UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development but is the result of the collective effort of the persons listed below who have been involved in different stages and degrees.

The work has been carried out under the direct responsibility of Pedro Roffe (Project Director, ICTSD) and Christoph Spennemann (Project Assistant, UNCTAD).² Graham Dutfield (Senior Research Fellow, Queen Mary Intellectual Property Research Institute, Queen Mary, University of London) was responsible for the substantive review, editing and polishing of the manuscript.

Frederick Abbott (Edward Ball Eminent Scholar Professor, Florida State University College of Law)³ and Carlos M. Correa (Professor, Director of the Masters Programme on Science and Technology Policy and Management, University of Buenos Aires)⁴ were the principal consultants and overall advisers.

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² C. Spennemann also prepared specific inputs to various chapters of the book and particularly to Chapter 32.

³ Besides his overall responsibility to this work, F. Abbott contributed with the original texts of Part 1 and Chapters 14, 15, 25 and 36.

⁴ Besides his overall responsibility to this work, C. Correa contributed with the original texts of Chapters 17, 21–24, 27, 28 and 30.

⁵ J. Adams contributed with inputs to Chapters 17–20 and 26.

⁶ M. Blakeney contributed with inputs to Chapters 14 and 15.

⁷ M. Garcia Rubio contributed with inputs to Chapters 32, 37 and 39.

⁸ M. Kumar contributed with inputs to Chapters 31–33, 35 and 36.

⁹ P. Muchlinski contributed with inputs to Chapter 34.

¹⁰ R. Okediji contributed with the original chapters on copyright in Part 2.

¹¹ M. Porzio contributed with inputs to Chapter 30.

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This activity benefited from the generous support of the Department for International Development (DFID) of the United Kingdom and the Swedish International Development Cooperation Agency (SIDA).

¹² U. Suthersanen contributed with the original text of Chapter 16.

¹³ G. Tansey provided valuable comments on all chapters of the book.

¹⁴ H. Ullrich contributed with the original text of Chapter 29.

Explanatory Note: The Methodology

The Resource Book, conceived as a practical guide to the TRIPS Agreement, provides detailed analysis of each of its provisions, aiming at a sound understanding of WTO Members' rights and obligations. The purpose is to clarify the implications of the Agreement, especially highlighting the areas in which the treaty leaves leeway to Members for the pursuit of their own policy objectives, according to their respective levels of development. In doing so, the book does not produce tailor-made prescriptions but gives guidance on the implications of specific issues and on the options available. The book is not limited to the analysis of the TRIPS Agreement but also considers related questions and developments at the national, regional and international level.

The preparation of this book was completed in May 2004. It will be periodically updated. The latest versions will be made available on the project website at <<http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm>>.

Structure and general contents

The Resource Book is divided into six parts, basically following the structure of the TRIPS Agreement. In synthesis it covers:

Part One: Nature of Obligations, Principles and Objectives

Articles 1 to 8, including the characterization of the TRIPS rules as minimum standards; the discretion of Members as to the method of implementation; the categories of intellectual property rights embraced by TRIPS; the national treatment and most-favoured-nation treatment obligations; the exhaustion of IPRs and the TRIPS objectives and principles.

Part Two: Substantive Obligations

Part Two corresponds to Sections 1–7 of Part II of the TRIPS Agreement. It deals in detail with all substantive rights covered by TRIPS, especially sensitive issues such as patents and related matters like the access to medicines and the Doha Declaration on the TRIPS Agreement and Public Health. Another patent issue concerns the ongoing negotiations under Article 27.3(b) on the patentability of life forms, where a thorough analysis of implementing options is presented, accompanied by a summary of Members' respective positions on the review of this provision. Moreover, the reader is provided with a detailed analysis of the TRIPS provisions on geographical indications, facilitating the understanding of the ongoing

negotiations in the Council for TRIPS. Other chapters concern copyright (including the WIPO "Internet Treaties"); trademarks; industrial designs; integrated circuits and undisclosed information.

Part Three: Intellectual Property Rights and Competition

Part Three covers Articles 8.2 and 40 of the Agreement. It deals in the main with measures needed to prevent the abuse of intellectual property rights.

Part Four: Enforcement, Acquisition and Maintenance of Rights

This part comprises Parts III and IV of the TRIPS Agreement. In this area WTO Members face considerable implementation challenges concerning the establishment of appropriate enforcement procedures.

Part Five: Interpretation and Dispute Prevention and Settlement

It deals with Part V of the TRIPS Agreement on transparency and dispute settlement and on the methods of interpretation employed by the WTO panels and the Appellate Body. The section on dispute settlement explains in detail the WTO dispute settlement system under the DSU and provides insight into the problems of a possible introduction of "non-violation complaints" to TRIPS-related disputes.

Part Six: Transitional and Institutional Arrangements

The final part of the book covers Parts VI and VII of the TRIPS Agreement. The main areas of interest for developing countries are the chapters on transitional periods, on technical cooperation and transfer of technology, especially on the obligation to provide for "mailbox" applications and exclusive marketing rights under Article 70.8 and 9.

The analysis of the individual TRIPS provisions

In the consideration and analysis of each of the TRIPS provisions, the book follows a common structure¹⁵ so that each chapter consists of the following sections and subsections:

1. Introduction: Terminology, definition and scope

This section contains general introductory observations on the issue under consideration.

2. History of the provision

This section is divided into two subsections dealing respectively with:

2.1 Situation pre-TRIPS

This subsection shows whether and to what extent the issue or subject-matter in question was dealt with prior to the TRIPS Agreement

¹⁵ The reader should note that while the book follows a common structure, due to its collective nature including resource persons from different legal traditions, some chapters treat certain issues favoring either a continental or a common law approach.

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2.2 Negotiating History

This subsection explains the different negotiating positions adopted during the Uruguay Round and provides the historical background to the understanding of the TRIPS provision under consideration.

This negotiating history follows, in general, a common pattern that describes, as necessary, the national positions of principal actors in the negotiations and a) the Anell Draft; b) the Brussels Draft; and, where appropriate, c) the Dunkel Draft.

a) The Anell Draft. In his July 23 1990 Report to the General Negotiating Group (GNG) on the status of work in the TRIPS Negotiating Group, the Chairman (Lars E. R. Anell) presented alternative draft texts. These "A" and "B" proposals differed not only with respect to the particular draft provisions, but also as far as the overall approach to a future agreement on trade-related IPRs was concerned.¹⁶ The main body of the report included "A" (developed country supported) and "B" (developing country supported) proposals that consolidated draft texts previously submitted by different delegations and included revisions based on consultations among the parties.¹⁷ There was also an Annex to the report that reproduced proposals previously submitted by delegations, which provisions had not been the subject of detailed consultations. The Annex did not attribute "A" and "B" proposals in the same way as the main report, and also referred to "C" proposals. Therefore, the distinction in the main report between developed country proposals on the one hand and developing country proposals on the other hand may not be made in the context of the Annex. While the main report of the Anell Draft contained Parts II (general provisions and basic principles), III (substantive IPR standards), IV (enforcement), V (acquisition of IPRs), and IX (trade in counterfeit and pirated goods), the Annex reproduced Parts I (preamble provision and objectives), VI (dispute prevention and settlement), VII (transitional arrangements), and VIII (institutional arrangements, final provisions).

b) The Brussels Draft corresponds to the Ministerial Text of December 1990 containing the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Revision, Trade-Related Aspects of Intellectual

¹⁶ Chairman's Report to the GNG, Status of Work in the Negotiating Group, Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, MTN.GNG/NG11/W/76, 23 July 1990.

¹⁷ See the Chairman's Report to the GNG, MTN.GNG/NG11/W/76, 23 July 1990: "[...] The two basic approaches to the negotiations on TRIPS are identified in the text by the letters A and B. These approaches differ not only in substance but also in structure. In broad terms, approach A envisages a single TRIPS agreement encompassing all the areas of negotiation and dealing with all seven categories of intellectual property on which proposals have been made; this agreement would be implemented as an integral part of the General Agreement. Approach B provides for two parts, one on trade in pirated and counterfeit goods (reflected in Part IX of the attached text) and the other on standards and principles concerning the availability, scope and use of intellectual property rights (reflected in Parts I-VIII). Under this approach, the latter part would cover the same categories of intellectual property as approach A, with the exception of the protection of trade secrets, which its proponents do not accept as a category of intellectual property; this part would be implemented in the 'relevant international organisation, account being taken of the multidisciplinary and overall aspects of the issues involved.' Options within an approach, A or B, are indicated by the use of square brackets or little "a"s, "b"s etc. [...]"

*Property Rights, Including Trade in Counterfeit Goods.*¹⁸ This draft text was prepared by Chairman Anell on his own responsibility and was said to reflect the results of negotiations through 22 November 1990. The Chairman submitted the draft text to the Brussels Ministerial Conference scheduled for 3–7 December 1990.

c) *The Dunkel Draft refers to then GATT Director General who proposed in December 1991 his Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.*¹⁹

3. Possible interpretations

Section 3 contains a technical analysis of the respective provision, providing legal arguments in favour of a development-friendly interpretation.

4. WTO jurisprudence

This section summarizes and analyses, in the light of the previous section, those parts of panel and Appellate Body reports dealing with the TRIPS provision under analysis.

5. Relationship with other international instruments

This section specifies how the respective subject matter is dealt with under other relevant agreements and how this could have implications for the TRIPS Agreement. The analysis is divided into two subsections:

5.1 WTO Agreements

5.2 Other international instruments

6. New developments

Section 6 provides for a comparison of the approaches taken by various legislations and provides further, where possible, an outlook on new and emerging issues. The common structure describes, as far as possible, developments in the following areas:

6.1 National laws

6.2 International instruments

6.3 Regional and bilateral contexts

6.4 Proposals for review

This subsection provides information on the latest stage of WTO negotiations on the respective subject matter.

7. Comments, including economic and social implications

Finally, section 7 of the common structure of the book highlights development-oriented policy issues and provides, in general broad, considerations on possible economic and social implications.

¹⁸ MTN.TNC/W/35/Rev. 1, 3 Dec. 1990.

¹⁹ MTN.TNG/W/FA, 20 Dec. 1991.

List of Acronyms

AB	Appellate Body
ARIPO	African Regional Industrial Property Organization
CAFTA	Central American Free Trade Agreement
CBD	Convention on Biological Diversity
CTM	Community Trade Mark
DMCA	Digital Millennium Copyright Act
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
EFTA	European Free Trade Area
EMRs	Exclusive Marketing Rights
EPC	European Patent Convention
EPO	European Patent Office
EU	European Union
FTAA	Free Trade Area of the Americas
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GIs	Geographical Indications
ICJ	International Court of Justice
IGC	(WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IP	Intellectual Property
IPIC Treaty	Treaty on Intellectual Property in Respect of Integrated Circuits
IPRs	Intellectual Property rights
ITC	International Trade Commission
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
IU	International Undertaking on Plant Genetic Resources
LDC	Least-developed country
MFN	Most-favoured Nation
NAFTA	North American Free Trade Agreement
OAPI	Organisation Africaine de la Propriété Intellectuelle (African Intellectual Property Organization)
OECD	Organisation for Economic Co-operation and Development
OHIM	(European) Office for Harmonization in the Internal Market
SCP	(WIPO) Standing Committee on the Law of Patents
SCT	(WIPO) Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications

TBT Agreement	Agreement on Technical Barriers to Trade
TK	Traditional Knowledge
TNC	Transnational Corporation
TNC	Trade Negotiations Committee
TNG	TRIPS Negotiating Group
TRIMS	Trade-related Investment Measures
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
UPOV	Union Internationale pour la Protection des Obtentions Végétales (International Union for the Protection of New Varieties of Plants)
URAA	Uruguay Round Agreements Act
VCLT	Vienna Convention on the Law of Treaties
WCT	WIPO Copyright Treaty
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization